

1 THE HONORABLE ROBERT S. LASNIK  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 JULI ADAMS, ) Case No. 2:14-cv-1174 RSL  
11 v. ) Plaintiff, ) **DEFENDANT'S MOTION TO**  
12 THE HARTZ MOUNTAIN ) ) **DISMISS PURSUANT TO**  
13 CORPORATION, ) ) **FRCP 12(b)(6)**  
14 Defendant. ) ) **NOTE ON MOTION CALENDAR:**  
15 ) ) **November 7, 2014**  
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DEFENDANT'S MOTION TO DISMISS  
NO. 2:14-CV-1174 RSL

128607.0001/6187918.1

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Defendant, The Hartz Mountain Corporation (“Hartz”), respectfully submits this Memorandum of Law in support of its motion to dismiss Plaintiff Juli Adams’s (“Plaintiff” or “Adams”) Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

## **PRELIMINARY STATEMENT**

All of the claims in the Complaint rely upon Plaintiff's incorrect contention that a Confidential Exclusive License Agreement<sup>1</sup> executed by the parties on November 20, 2006 (“Agreement”) constitutes a license from Plaintiff to Hartz of the trademark ANGRY BIRDS, and that Hartz thereafter made unauthorized use of the ANGRY BIRDS trademark. However, the clear language of the Agreement, attached as Exhibit A to the Complaint, demonstrates that the only “Intellectual Property” licensed from Plaintiff to Hartz were Plaintiff's drawings or illustrations of animals. Therefore, all of Plaintiff's claims must be dismissed as a matter of law.

Plaintiff does not allege that she ever used the ANGRY BIRDS trademark for the promotion or sale of any products in U.S. commerce. She contends instead that she “coined the term” ANGRY BIRDS, and that her license of illustrations to Hartz constituted a license for Hartz to use the trademark ANGRY BIRDS. Even if Plaintiff’s contentions are taken as true, “coining a term” does not give rise to trademark rights under U.S. law. Neither did Plaintiff acquire trademark rights via Hartz’s use of the mark in connection with licensed goods, because the plain language of the Agreement makes clear that there was no license of the ANGRY BIRDS mark. Indeed, there is no mention of the trademark ANGRY BIRDS in the entire Agreement, let alone language which constitutes a valid license of the trademark from Plaintiff to Hartz.

The Complaint repeatedly refers to “Intellectual Property” as if the trademark ANGRY BIRDS is part of the Agreement’s definition of “Intellectual Property.” However, the plain

<sup>1</sup> Plaintiff's disclosure of the terms of the Agreement and the negotiations that gave rise to the Agreement by disclosing the same in the Complaint and filing an unredacted copy of the Agreement with the Court clerk constitute a breach of Article 7.4.

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1 language of the Agreement demonstrates this is not the case. The Agreement clearly defines  
 2 the “Intellectual Property” that is the subject of the Agreement only as the artwork included as  
 3 Appendix B of the Agreement. The trademark ANGRY BIRDS is not included in Appendix B,  
 4 or anywhere else in the Agreement.

5 In fact, the Complaint admits that Hartz is the sole registered owner of a U.S.  
 6 Trademark Registration for the word mark ANGRY BIRDS. The plain language of the  
 7 Agreement upon which all of Plaintiff’s claims rely prohibits her from challenging Hartz’s  
 8 rights in the trademark. Even if the Court found – contrary to the clear language of the  
 9 Agreement – that the Agreement contemplated a trademark license, the language of the  
 10 Agreement is not sufficient to constitute a valid and enforceable trademark license because it  
 11 does not even mention the trademark ANGRY BIRDS, and does not contain the necessary  
 12 quality control provisions.

13 Plaintiff’s claims for breach of contract, infringement, unjust enrichment and an  
 14 accounting depend upon the presumption that she owns trademark rights in the ANGRY  
 15 BIRDS mark because she “coined the term” and thereafter licensed such rights to Hartz in the  
 16 Agreement. However, as coining a term does not establish trademark rights as a matter of law,  
 17 and as it is clear on the face of the Agreement that it contains no license of the ANGRY BIRDS  
 18 trademark from Plaintiff to Hartz, such claims must be dismissed. Plaintiff’s claim for  
 19 conversion must also be dismissed because such a claim cannot be predicated on intangible  
 20 intellectual property as a matter of law. Plaintiff’s claim for declaratory judgment must also be  
 21 dismissed as a matter of law because it merely seeks recourse for prior actions which are  
 22 duplicative of the other claims. Likewise, Plaintiff’s claim for an accounting seeks damages for  
 23 claims that fail and, therefore, cannot stand. Therefore, all of the claims in Plaintiff’s  
 24 Complaint should be dismissed as a matter of law.<sup>2</sup>

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26 <sup>2</sup> The clear language of Article 6.5 of the Agreement prohibits the award of consequential damages (Compl. Ex. A  
 27 at 6.5). Therefore, any claims for such damages, including lost profits, loss of goodwill, or any special, indirect  
 or consequential or incidental damages, should be dismissed as a matter of law.

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## STATEMENT OF FACTS<sup>3</sup>

Plaintiff is a contemporary painter who resides in Seattle, Washington. (Compl. ¶ 10.) Hartz is a pet product company headquartered in New Jersey. (Compl. ¶ 11.) In the summer of 2006, Plaintiff exhibited her original art work at a festival in Montana, which included drawings of cartoon animals. (Compl. ¶ 17.) A representative of Hartz asked Plaintiff if she would be interested in designing a line of pet toys for Hartz. (Compl. ¶ 18.) Plaintiff thereafter created a number of drawings of various animals, including birds, bears, gophers, and rabbits. (Compl. ¶ 19.) Once the designs were completed, Hartz and Plaintiff negotiated and, on November 20, 2006, executed the Agreement. (Compl. ¶¶ 21-22.)

The Agreement had an initial term of five years that began after the “first sale of each Licensed Product.” (Compl. Ex. A at App’x A.) The first sale of any Licensed Product was in or around March 2007. (Compl. ¶ 24.) The initial term of the Agreement thus terminated in March 2012. (*Id.*) In the event the parties desired to extend the Agreement beyond its initial term, they were to enter into an amendment thereof. (Compl. ¶ 25.) No such amendment was executed. (Compl. ¶ 53.)

Under the Agreement, Plaintiff licensed to Hartz:

[O]n an exclusive basis (which shall also exclude Juli Adams) the Intellectual Property for the purpose of the use, manufacture, packaging, promotion, advertising, merchandising and sale of the Licensed Products in the Distribution Area in the Channels of Trade, provided that Hartz agrees not to produce two dimensional wall art other than for promotional, advertising, merchandising and sale purposes of the Licensed Products.

(Compl. Ex. A at Art. 2.1.) Hartz owes no duty of exclusivity to Plaintiff under the Agreement. Article 2.1 provides: "Nothing set forth herein shall prohibit Hartz from selling any products or services whatsoever using the Intellectual Property or Hartz'[s] own intellectual property, whether in or outside of the Distribution Area, whether to the same customers of Juli Adams or

<sup>3</sup> To the extent Plaintiff's factual allegations in the Complaint are cited herein, they are accepted as true only for purposes of the present motion to dismiss pursuant to Rule 12(b)(6). Defendant expressly reserves its right to challenge any such factual allegations and to raise all affirmative defenses and counterclaims.

<sup>4</sup> “Compl.” refers to Plaintiff’s Complaint, filed on August 4, 2014, which attaches as Exhibit A the Agreement, and as Exhibit B Amendment Number One to the Agreement (ECF No. 5).

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1 otherwise.” (*Id.*)

2 The Agreement defines “Intellectual Property” as:

3 *[A]ll intellectual property of Juli Adams licensed under this Agreement*  
 4 *including (a) the intellectual property attached hereto as Appendix B and (b)*  
 5 *such future intellectual property of Juli Adams as Hartz shall request from time*  
 6 *to time, which additional intellectual property shall be added to this Agreement*  
 7 *upon notice by Hartz to Juli Adams and pursuant to an amendment to this*  
 8 *Agreement, which amendment shall have the same terms and conditions as set*  
 9 *forth in this Agreement unless the parties otherwise agree in such amendment.*

10 (Compl. Ex. A at App’x A.) Appendix B of the Agreement, in turn, annexes thirty-seven pages  
 11 of Plaintiff’s drawings. (Compl. ¶ 27, Ex. A at App’x B.) “Each party acknowledge[d] that no  
 12 transfer of ownership of or a license to any intellectual property is contemplated by this  
 13 Agreement, except as expressly provided herein.” (Compl. Ex. A at Art. 8.) Article 6.2.1 of  
 14 the Agreement further provides that Plaintiff shall “not seek, directly or indirectly, the  
 15 invalidity or challenge or claim against the Intellectual Property or any Hartz intellectual  
 16 property or Proprietary Technology at any time.” (Compl. Ex. A at Art. 6.2.1.)

17 The Agreement defines “Licensed Products” to mean “all products and services  
 18 regardless of class or kind related to the Hartz business from time to time but including without  
 19 limitation the products set forth on Exhibit A attached hereto and made an integral part hereof.”

20 (Compl. Ex. A. at App’x A.) As the Agreement does not attach an Exhibit A, the definition of  
 21 Licensed Products is “all products and services regardless of class or kind related to the Hartz  
 22 business from time to time.” (*Id.*) Pursuant to the Agreement, “Distribution Area” means “the  
 23 world” and “Channels of Trade” means “all channels of trade without limitation . . . .” (*Id.*)

24 Article 8 of the Agreement grants Hartz the “right to file copyright and other intellectual  
 25 property right filings, in its discretion, for all of the Licensed Products.” (Compl. Ex. A at Art.  
 26 8.) On May 22, 2007, Hartz and Plaintiff executed Amendment Number One to the  
 27 Agreement, which amended the end of Article 8 to read as follows:

28 *Hartz shall have the right to file copyright, trademark and other intellectual*  
 29 *property right filings in Hartz’s name, in its discretion, for all of the Licensed*  
 30 *Products. Additionally, Hartz shall have the right to obtain the trademark “The*  
 31 *Juli Adams Collection” in Hartz’s name and use it for Hartz’s products.*

32 (Compl. Ex. B.) Aside from granting Hartz the right to use the mark “The Juli Adams  
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1 Collection,” Amendment Number One does not bestow Hartz with any additional rights that are  
 2 not already licensed in the underlying Agreement. (*Id.*) The first sentence merely rewords  
 3 Article 8 to explicitly include references to “trademark” and “in Hartz’s name.” (*Compare to*  
 4 Compl. Ex. A. at Art. 8.) The second sentence adds the provision that Hartz could trademark  
 5 “The Juli Adams Collection” in connection with the products if it so desired. (*Id.*) The  
 6 Complaint does not allege that Hartz used or registered trademark “The Juli Adams  
 7 Collection.”

8 Pursuant to an application filed on March 28, 2007, Hartz owns U.S. Trademark  
 9 Registration No. 3,473,227 for the mark ANGRY BIRDS as used in connection with “Pet  
 10 toys.” (Compl. ¶ 33.) In or around 2007, Hartz began selling a line of pet toys which were  
 11 created from Plaintiff’s licensed illustrations in connection with which Hartz used the mark to  
 12 identify the products. (Compl. ¶¶ 24, 31-32.) The packaging for the products bearing the  
 13 ANGRY BIRDS mark displayed Plaintiff’s illustrations and included the notice “Licensed from  
 14 *the art of Juli Adams.*” (Compl. ¶¶ 31-32 (emphasis added).) The packaging for the products  
 15 does not contain any claim that Plaintiff owned any trademark rights related to the licensed  
 16 products. (Compl. ¶¶ 31-32.)

## ARGUMENT

17 On a motion to dismiss pursuant to Rule 12(b)(6), a court must determine whether the  
 18 complaint contains “sufficient factual matter, accepted as true, to state a claim for relief that is  
 19 plausible on its face.” *Shields v. Boeing Co.*, No. C11-926Z, 2011 WL 2680506, at \*1 (W.D.  
 20 Wash. July 8, 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 1949  
 21 (2009)). “A claim has facial plausibility when the plaintiff pleads factual content that allows  
 22 the court to draw the reasonable inference that the defendant is liable for the misconduct  
 23 alleged.” *Id.* When ruling on a motion to dismiss, the Court may “consider only allegations  
 24 contained in the pleadings, exhibits attached to the complaint, and matter properly subject to  
 25 judicial notice.” *Id.* The Court is “not required to accept as true conclusory allegations which  
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1 are contradicted by documents referred to in the complaint.” *Steckman v. Hart Brewing, Inc.*,  
 2 143 F.3d 1293, 1295-96 (9th Cir. 1998) (internal citations omitted). Indeed, where “the  
 3 documents attached to [plaintiff]’s complaint defeat her breach of contract allegations,  
 4 [plaintiff] cannot state a claim that would entitle her to relief.” *Tritz v. U.S. Postal Serv.*, 721  
 5 F.3d 1133, 1140 (9th Cir. 2013) (citing *Nat’l Ass’n for the Advancement of Psychoanalysis v.*  
 6 *Cal. Bd. of Psych.*, 228 F.3d 1043, 1049 (9th Cir. 2000) (“In determining whether plaintiffs can  
 7 prove facts in support of their claim that would entitle them to relief, we may consider facts  
 8 contained in documents attached to the complaint.”)).

9

10 **I. PLAINTIFF’S BREACH OF CONTRACT CLAIM FAILS BECAUSE ON THE  
 11 FACE OF THE AGREEMENT THERE IS NO CONTRACT WITH RESPECT  
 12 TO THE ANGRY BIRDS TRADEMARK**

13 To state a claim for breach of contract under New Jersey law<sup>5</sup>, a plaintiff must allege:  
 14 (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom;  
 15 and (4) that the party stating the claim performed its own contractual obligations. *Gordon v.*  
 16 *United Cont’l Holding, Inc.*, No. 2:13-CV-05967 (SDW), 2014 WL 4354067, at \*4 (D.N.J.  
 17 Sept. 3, 2014) (citing *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007)).

18 Plaintiff’s breach of contract claim rests on the allegation that, pursuant to the  
 19 Agreement, she licensed Hartz the right to use of the ANGRY BIRDS trademark. In particular,  
 20 she alleges that Hartz breached the Agreement through “the unauthorized use of [Adams’s]  
 21 Intellectual Property; the failure to safeguard [Adams’s] Intellectual Property as required by the  
 22 Agreement; the failure to purchase [Adams’s] Intellectual Property as required by the  
 23 Agreement for Hartz’[s] continued use; and the continued use of [Adams’s] Intellectual  
 24 Property after the Agreement expired in 2012.” (Compl. ¶ 68.) More specifically, Plaintiff  
 25 alleges that Hartz breached the Agreement when it entered into a deal with Rovio  
 26 Entertainment, Ltd. (“Rovio”), the creator of the video game “Angry Birds,” to sell pet toys

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 5 The Agreement provides that New Jersey law applies to its validity, interpretation and performance. (Compl. ¶ 16, Ex. A at Art. 10.14.)

1 utilizing intellectual property of Rovio under the ANGRY BIRDS mark. (Compl. ¶¶ 6, 45-48,  
 2 55.) However, the clear terms of the Agreement demonstrate that there was no contract to  
 3 license any trademark from Plaintiff to Hartz. The trademark ANGRY BIRDS is not even  
 4 referenced in the Agreement. All that was licensed under the Agreement was the use of  
 5 Plaintiff's artwork.

6 New Jersey law requires that contracts "be construed according to the plain and  
 7 ordinary meaning of their terms. 'Clear contractual terms that are capable of one reasonable  
 8 interpretation must be given effect without reference to matters outside the contract.' Thus, the  
 9 Court must give force to the intent of the parties by interpreting the contract according to the  
 10 plain meaning of its term." *Mollo v. Passaic Valley Sewerage Comm'r*, No. 07-1655 (DRD),  
 11 2009 WL 5216976, at \*16 (D.N.J. Dec. 30, 2009) (internal citations omitted).

12 Here, the Agreement defines Intellectual Property as:

13 *[A]ll intellectual property of Juli Adams licensed under this Agreement  
 14 including (a) the intellectual property attached hereto as Appendix B and (b)  
 15 such future intellectual property of Juli Adams as Hartz shall request from time  
 16 to time, which additional intellectual property shall be added to this Agreement  
 17 upon notice by Hartz to Juli Adams and pursuant to an amendment to this  
 18 Agreement, which amendment shall have the same terms and conditions as set  
 19 forth in this Agreement unless the parties otherwise agree in such amendment.*

20 (Compl. Ex. A at App'x A.) Appendix B consists of nothing more than pages of Plaintiff's  
 21 illustrations of animals. (Compl. Ex. A at App'x B.) Appendix B does not reference the  
 22 trademark ANGRY BIRDS, or any other trademark. (*Id.*) The parties executed no  
 23 amendments that add license of the ANGRY BIRDS trademark nor does Plaintiff allege that  
 24 they did. As such, the Intellectual Property licensed under the Agreement is clearly confined to  
 25 the illustrations contained in Appendix B to the Agreement. Thus, even if the Court construes  
 26 the pleadings in Plaintiff's favor, the plain language of the contract demonstrates that the word  
 27 mark ANGRY BIRDS, which underlies Plaintiff's breach of contract claim, was not the subject  
 of the parties' Agreement. The inquiry must end here, as "[e]ach party acknowledge[d] that no  
 transfer of ownership of or a license to any intellectual property is contemplated by this

1 Agreement, *except as expressly provided herein.*” (Compl. Ex. A at Art. 8 (emphasis added).)<sup>6</sup>  
 2 Moreover, the plain language of the Agreement bars Plaintiff’s challenge to Hartz’s ownership  
 3 of the ANGRY BIRDS mark. (Compl. Ex. A at Art. 6.2.1.) Indeed, Plaintiff admits that the  
 4 Intellectual Property contemplated by the Agreement is distinct from the ANGRY BIRDS  
 5 trademark, as she seeks a declaration that the “Intellectual Property and the ‘Angry Birds’  
 6 trademark” are her exclusive property. (Compl. ¶ 92.) Therefore, as the parties had no contract  
 7 with respect to the trademark, Hartz’s use of the trademark ANGRY BIRDS cannot constitute  
 8 breach of the Agreement as a matter of law.

9 Plaintiff’s allegation that Amendment Number One to the Agreement is void for lack of  
 10 consideration is a red herring which does not save her claims from dismissal. (Compl. ¶¶ 36-  
 11 37.) As an initial matter, the clear and unambiguous language of the Amendment states that the  
 12 parties agree it was entered into “for good and valuable consideration.” (Compl. Ex. B.) “[I]t  
 13 is an elementary principle that the law will not enter into an inquiry as to the adequacy of the  
 14 consideration.” *Am. Handkerchief Corp. v. Frannat Realty Co.*, 109 A.2d 793, 796 (N.J. 1954).  
 15 In any event, Article 8 of the original Agreement provides that “Hartz shall have the right to  
 16 file copyright and other intellectual property right filings, in its discretion, for all of the  
 17 Licensed Products.” (Compl. Ex. A at Art. 8.) The first sentence of Amendment Number One  
 18 simply restates the foregoing, explicitly referencing “trademark” among the enumerated  
 19 examples of “intellectual property rights filings” and that such filings are “in Hartz’s name.”  
 20 (Compl. Ex. B.) This amendment does not grant Hartz any greater rights than it had under the  
 21 Agreement in this respect and is therefore not a relevant change. The second sentence adds the  
 22 provision allowing Hartz to use or register the trademark “The Juli Adams Collection.” (*Id.*)  
 23 Therefore, assuming *arguendo* the Amendment has no effect, it is of no import as Article 8 of  
 24 the Agreement provides that Hartz was entitled to register “intellectual property,” which

25  
 26 <sup>6</sup> Plaintiff contends this provision means that the Agreement did not grant Hartz any ownership interest in the  
 27 ANGRY BIRDS mark. (Compl. ¶ 28.) However, at most, this provision means Hartz has no ownership interest  
 in the Intellectual Property (defined as the illustrations) licensed under the Agreement. On its face, the  
 Intellectual Property licensed by the Agreement does not include the ANGRY BIRDS mark.

1 unquestionably includes trademarks in its own name. The Complaint does not allege Hartz's  
 2 unauthorized use or registration of the trademark "The Juli Adams Collection." Therefore, the  
 3 Amendment has no relevance to Plaintiff's claims. Moreover, as set forth above, even if  
 4 Plaintiff is correct that she remains the "sole owner" of the Intellectual Property licensed by the  
 5 Agreement, it is clear on the face of the Agreement that such Intellectual Property does not  
 6 include the ANGRY BIRDS trademark.

7 Since the Agreement on its face does not mention the ANGRY BIRDS trademark or  
 8 consist of a license of the ANGRY BIRDS mark, Hartz's exploitation of the mark cannot, as a  
 9 matter of law, constitute a breach of the Agreement. Accordingly, Plaintiff's claim for breach  
 10 of contract must be dismissed as a matter of law.

11 **II. PLAINTIFF LACKS STANDING TO BRING A "FEDERALLY REGISTERED  
 TRADEMARK CLAIM"**

12 In Count VI of the Complaint, Plaintiff purports to bring a "Federally Registered  
 13 Trademark Claim" under Section 43 of the Lanham Act, 15 U.S.C. § 1125. (Compl. ¶ 94.)  
 14 However, a claim for infringement of a federally registered trademark is properly pled under  
 15 Section 32 of the Lanham Act, 15 U.S.C. § 1114. Thus, on its face, the Complaint fails to state  
 16 a claim of infringement of a federally registered trademark.  
 17

18 In any event, Plaintiff does not have the requisite standing to sustain a claim for federal  
 19 registered trademark infringement. Section 32 of the Lanham Act imposes liability upon:  
 20

21 *(1) Any person who shall, without the consent of the registrant—  
 22 (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation  
 23 of a registered mark in connection with the sale, offering for sale, distribution,  
 24 or advertising of any goods or services on or in connection with which such use  
 25 is likely to cause confusion, or to cause mistake, or to deceive . . .*

26 15 U.S.C. 1114. Accordingly, standing to sue is conferred upon "the registrant . . . of a  
 27 registered mark." *Id.*

28 Here, Plaintiff lacks standing to bring a claim under Section 32 of the Lanham Act  
 29 because she does not own the rights to a U.S. trademark registration for the ANGRY BIRDS

1 trademark. As Plaintiff concedes, Hartz filed for and was granted U.S. Trademark Registration  
 2 No. 3,473,227 for ANGRY BIRDS for pet products. (Compl. ¶ 33.) Hartz's valid U.S.  
 3 trademark registration constitutes *prima facie* evidence of its ownership of the ANGRY BIRDS  
 4 mark. *See E.A. Sween Co. v. Deli Exp. of Tenafly, LLC*, No. 2:13-6337 (KM), 2014 WL  
 5 1911878, at \*4 (D.N.J. May 13, 2014). Plaintiff does not contest either the validity of the mark  
 6 or the fact that the registration is in Hartz's name. Indeed, Article 8 of the Agreement makes  
 7 clear that Hartz had the right to make such trademark filings in its own discretion (Compl. Ex.  
 8 A at Art. 8), and Article 6.2.1 of the Agreement bars Plaintiff from seeking "directly or  
 9 indirectly, the invalidity or challenge or claim against the Intellectual Property or any Hartz  
 10 intellectual property or Proprietary Technology at any time" (Compl. Ex. A at Art. 6.2.1).  
 11 Accordingly, to the extent Plaintiff's complaint can be construed to assert a claim for federal  
 12 registered trademark infringement, any such claim should be dismissed for lack of standing and  
 13 as any such claim is prohibited by the plain terms of the Agreement.  
 14

15 **III. PLAINTIFF DOES NOT PROPERLY PLEAD OWNERSHIP OF COMMON  
 16 LAW TRADEMARK RIGHTS**

17 To state a claim for false designation of origin under 15 U.S.C. § 1125(a), "a plaintiff  
 18 must demonstrate that: (1) it has a valid and legally protectable mark; (2) it owns the mark; and  
 19 (3) the defendant's use of the mark to identify goods or services causes a likelihood of  
 20 confusion." *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210-11 (3d  
 21 Cir. 2000). Here, Plaintiff's claim that she owns rights in and to the ANGRY BIRDS  
 22 trademark fails as a matter of law.  
 23

24 Plaintiff alleges that she "coined and is the rightful owner of the 'Angry Birds'  
 25 trademark for the category of 'Toys and Sporting Goods.'" (Compl. ¶ 108.) However, it is  
 26 well established that "coining" a term does not amount to trademark ownership. Trademark  
 27

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1 rights arise only as the result of use of the mark in connection with the sale of goods or  
 2 services. *See generally* J. Thomas McCarthy, 2 *McCarthy on Trademarks and Unfair*  
 3 *Competition* § 16:11 (4th ed. 2014) [hereinafter “*McCarthy on Trademarks*”]; *see also* *Rolley,*  
 4 *Inc. v. Younghusband*, 204 F.2d 209, 212 (9th Cir. 1953) (“He who first affixes a trade-mark  
 5 upon his goods is its owner, not the person who first conceives the idea.”). “Mere adoption of a  
 6 mark or sign, and a public declaration, by advertisement or otherwise that a person will, at a  
 7 subsequent time, put a particular thing on the market, marked or distinguished, in a certain way,  
 8 create no right. Until the thing is actually on the market, marked by the particular mark of the  
 9 person intending to acquire a title, no property right in the mark arises.” *Englander v.*  
 10 *McKesson-Roeberkuebler Co.*, 185 A. 917, 921 (N.J. Ch. 1936) (citation and quotation marks  
 11 omitted).

13 Plaintiff does not allege that she engaged in use of the mark ANGRY BIRDS in  
 14 connection with the promotion or sale of goods or services at any time. Instead, Plaintiff  
 15 claims that her rights in the mark result from Hartz’s use pursuant to license under the  
 16 Agreement. Plaintiff alleges that she “used the ‘Angry Birds’ trademark in commerce when (a)  
 17 it was licensed to Hartz, and (b) when Hartz sold Angry Birds plush toys based on Plaintiff  
 18 Adams’[s] designs with the mark ‘Angry Birds’ and a trademark notice prominently displayed  
 19 on the packaging.”<sup>7</sup> (Compl. ¶ 109.) However, this is belied by the plain language of the  
 20 Agreement, which clearly only licenses the use of Plaintiff’s illustrations. Indeed, there is no  
 21 mention of the trademark ANGRY BIRDS in the entire Agreement. Because there was no  
 22 license of any trademark from Plaintiff to Hartz, Hartz’s use of the ANGRY BIRDS trademark  
 23 inured only to the benefit of Hartz. There is no basis in the law for Plaintiff’s proposition that

26 <sup>7</sup> Any trademark notice on the Angry Birds product packaging refers to Hartz’s ownership of the ANGRY BIRDS  
 27 trademark. The packaging shown in the Complaint clearly demonstrates that the notice of Plaintiff’s rights was  
 limited to licensed use of Plaintiff’s “art,” not any trademark. (Compl. ¶ 32.)

1 Plaintiff has ownership rights in any trademark Hartz chooses to use in connection with  
 2 products that happen to include Plaintiff's illustrations. Nor does the Complaint allege any.  
 3 Therefore, Plaintiff's license of artwork to Hartz for the licensed products bestows no rights to  
 4 Plaintiff for any trademark or brand name used to identify the licensed goods.  
 5

6 Even if Plaintiff intended to license the use of the ANGRY BIRDS trademark – which  
 7 she did not – the plain language of the Agreement does not constitute a valid and enforceable  
 8 trademark license as a matter of law because it does not even mention the ANGRY BIRDS  
 9 mark and contains no quality control provisions. *See 3 McCarthy on Trademarks* § 18:42  
 10 (“Today, trademark licensing is permitted so long as the licensor maintains adequate control  
 11 over the nature and quality of goods and services sold under the mark by the licensee.”);  
 12 *Doeblers' Pennsylvania Hybrids, Inc. v. Doebler*, 442 F.3d 812, 823 (3d Cir. 2006) (“[T]he  
 13 only effective way to protect the public where a trademark is used by licensees is to place on  
 14 the licensor the affirmative duty of policing in a reasonable manner the activities of his  
 15 licensees.”) (citation omitted; alteration in original). Thus, although it is true that  
 16 “[o]wnership rights in a trademark or service mark can be acquired and maintained through the  
 17 use of the mark by a controlled licensee even when the first and only use of the mark was  
 18 made, and is being made, by the licensee,” a licensee's use of a trademark inures to the benefit  
 19 of the licensor only if, in granting the licensee the exclusive right to use the trademark, the  
 20 licensor does not abandon its rights to the trademark. *Doebler*, 442 F.3d at 823 (citing 2  
 21 *McCarthy on Trademarks* § 18:46 (4th ed. 2005)).  
 22

24 The exclusive use of a trademark by a licensee constitutes abandonment unless the  
 25 “license agreement provides for adequate control by the licensor of the nature and quality of the  
 26 goods or services.” *Id.* A license agreement that provides for adequate control will generally  
 27

1 “contain[] express terms giving the licensor power to engage in quality control to ensure that  
 2 the licensee does not engage in mere ‘naked’ use of the mark” – i.e., “[u]ncontrolled licensing  
 3 of a mark whereby the licensee can place the mark on any quality or type of goods or  
 4 services[.]” *Id.*

5 Here, the Agreement does not even mention the trademark ANGRY BIRDS, let alone  
 6 provide that Plaintiff will have any quality control over the Licensed Goods. In fact, the  
 7 language of the Agreement demonstrates that Hartz retained ownership of the trademark and  
 8 related packaging of the Licensed Products. (Compl. Ex. A at Art. 8.) Moreover, Plaintiff was  
 9 required to obtain Hartz’s permission prior to posting content on her website relating to the  
 10 Licensed Products: “[Plaintiff] shall be permitted to . . . post on Juli Adams’[s] website pictures  
 11 of the Licensed Products provided Hartz shall have reviewed and approved in advance any such  
 12 postings and further provided [Plaintiff] shall not sell, offer or otherwise promote the sales of  
 13 the Licensed Products on her website without the prior written approval of Hartz.” (Compl. Ex.  
 14 A at Art. 7.6.) Thus, to the extent the Agreement grants any trademark license, it is a limited  
 15 license from Hartz to Plaintiff allowing her to use the trademarks to promote her artwork  
 16 during the term of the Agreement.

17 Therefore, if the Court assumed, *arguendo* and contrary to the plain language of the  
 18 Agreement, that the Agreement included a trademark license of ANGRY BIRDS from Plaintiff  
 19 to Hartz, it was void *ab initio* for failure to include necessary quality control provisions.  
 20 Accordingly, Hartz’s use of any such trademark would not inure to Plaintiff’s benefit. Because  
 21 Plaintiff cannot establish ownership of the ANGRY BIRDS mark via her use of the mark in  
 22 commerce, or via a valid and enforceable license to Hartz in the Agreement, her claim for  
 23 common law trademark infringement must be dismissed as a matter of law. Moreover, because  
 24

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1 the plain language of the Agreement bars Plaintiff from challenging Hartz's rights in the  
 2 trademark (Compl. Ex. A at Art. 6.2.1), Plaintiff's claims must be dismissed.

3 **IV. PLAINTIFF'S CONVERSION CLAIM MUST BE DISMISSED**

4 In support of her claim for conversion, Plaintiff alleges that Hartz "converted, without  
 5 lawful justification, Plaintiff Adams'[s] ownership of the 'Angry Birds' trademark by failing to  
 6 assign the mark to Plaintiff when the Agreement . . . expired." (Compl. ¶ 86.) As discussed  
 7 above, Plaintiff does not, nor did she ever, own the ANGRY BIRDS trademark. Her claim for  
 8 conversion, therefore, must fail for this reason. In any event, under New Jersey law, "a cause  
 9 of action for conversion relates to interference with tangible property and does not protect  
 10 rights to intangible property [such as] . . . intellectual property . . ." *StrikeForce Tech., Inc. v.*  
 11 *Whitesky, Inc.*, No. 13-1895 (SRC), 2013 WL 3508835, at \*8 (D.N.J. July 11, 2013). Thus, for  
 12 this additional and independent reason, Plaintiff's claim for conversion must be dismissed as a  
 13 matter of law.

14 **V. PLAINTIFF'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF  
 15 GOOD FAITH AND FAIR DEALING FAILS AS A MATTER OF LAW**

16 Plaintiff's claim for breach of the duty of good faith and fair dealing is likewise  
 17 premised upon Plaintiff's ownership of the ANGRY BIRDS trademark and license thereof to  
 18 Hartz. (Compl. ¶ 76.) However, as discussed in detail above, Plaintiff never owned the mark,  
 19 and the Agreement does not constitute a trademark license. As such, Plaintiff cannot, as a  
 20 matter of law, make a showing "sufficient to support the conclusion that the party alleged to  
 21 have acted in bad faith [i.e., Hartz] has engaged in some conduct that denied the benefit of the  
 22 bargain originally intended by the parties." *Clarkson v. VioQuest Pharm.*, 2011 WL 3924824,  
 23 at \*8 (N.J. Sept. 8, 2011) (unpublished opinion) (quoting *Brunswick Hills Racquet Club, Inc. v.*  
 24 *Route 18 Shopping Ctr. Assocs.*, 864 A.2d 387, 396 (N.J. 2005)). "[T]he implied duty of good  
 25

1 faith and fair dealing ‘does not operate to alter the clear terms of an agreement and may not be  
 2 invoked to preclude a party from exercising its express rights under such an agreement.’’’ *Luso*  
 3 *Fuel, Inc. v. BP Products North America Inc.*, No. 08-3947 (DMC), 2009 WL 1873583, at \*5  
 4 (D.N.J. June 29, 2009) (citation omitted).

5 Here, the Agreement on its face is a license from Plaintiff to Hartz to use her artwork.  
 6 Plaintiff cannot be heard now to invoke the implied duty of good faith and fair dealing to  
 7 expand the scope of her Agreement. Indeed, New Jersey courts have routinely held that ‘the  
 8 ‘function of the court is to enforce the [agreement] as written, not to write for the parties a  
 9 different or a better contract.’’ *Freedman Truck Ctr. v. General Motors Corp.*, 784 F. Supp.  
 10 167, 178 (D.N.J. 1992) (internal citation omitted). Here, to read into the Agreement a license  
 11 for the ANGRY BIRDS trademark would amount to the Court impermissibly attempting to  
 12 ‘write for [one of] the parties a different or a better contract.’’ *Id.* Accordingly, Plaintiff’s  
 13 claim for breach of the implied covenant of good faith and fair dealing, like her claims for  
 14 breach of contract and trademark infringement, must be dismissed based on the plain terms of  
 15 the written Agreement.

18 **VI. PLAINTIFF’S UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF  
 19 LAW**

20 A claim for unjust enrichment requires that: (1) at plaintiff’s expense; (2) defendant  
 21 received a benefit; (3) under circumstances that would make it unjust for defendant to retain the  
 22 benefit without paying for it. *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, No. 03-4558  
 23 (HAA), 2008 WL 4126264, at \*21 (D.N.J. Sept. 2, 2008). ‘To assert a claim of unjust  
 24 enrichment a plaintiff must show that ‘it expected remuneration from the defendant at the time  
 25 it performed or conferred a benefit on defendant and that the failure of remuneration enriched  
 26 defendant beyond its contractual rights.’’’ *Prima v. Darden Rests., Inc.*, 78 F. Supp. 2d 337,  
 27

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1 355 (D.N.J. 2000) (citation omitted).

2 Plaintiff alleges that Hartz was unjustly benefited by “selling Rovio-themed ‘Angry  
3 Birds’ pet toys when it no longer was the owner of the ‘Angry Birds’ trademark for such  
4 products.” (Compl. ¶ 80.) Thus, Plaintiff’s unjust enrichment claim is dependent upon the  
5 incorrect contention that the Agreement constitutes a trademark license from Plaintiff to Hartz.  
6 However, since Plaintiff never owned any rights in the ANGRY BIRDS mark, and never  
7 licensed any trademark rights under the Agreement, there is no basis for Plaintiff’s unjust  
8 enrichment claim. Any benefit reaped by Hartz pursuant to the sale of products bearing the  
9 ANGRY BIRDS trademark did not violate any Agreement between Plaintiff and Hartz, nor  
10 unjustly enrich Hartz beyond its contractual rights. Accordingly, Plaintiff’s unjust enrichment  
11 claim fails as a matter of law.

## 13 **VII. PLAINTIFF IS NOT ENTITLED TO A DECLARATORY JUDGMENT**

14 Plaintiff “seeks a declaration from the Court confirming that the Intellectual Property  
15 and the ‘Angry Birds’ trademark utilized by Hartz are her exclusive property and that Hartz  
16 should have returned and released all rights to Plaintiff after the Agreement expired in 2012.”  
17 (Compl. ¶ 92.) This claim should be dismissed because it seeks relief beyond the scope of the  
18 Declaratory Judgment Act, and because the substantive claims on which it is based fail as a  
19 matter of law.

20 “The granting of a declaratory judgment is discretionary and not mandatory.” *Travelers*  
21 *Ins. Co. v. Davis*, 490 F.2d 536, 543 (3d Cir. 1974). “Declaratory judgments are meant to  
22 define the legal rights and obligations of the parties in anticipation of some future conduct[,]”  
23 not “to proclaim that one party is liable to another.” *Andela v. Administrative Office of U.S.*  
24 *Courts*, 569 Fed. Appx. 80, 83 (3d Cir. 2014). In *Andela*, the Third Circuit refused to grant  
25

1 declaratory relief “[b]ecause the conduct alleged in the complaint took place in the past.” *Id.*  
 2 Similarly, in *Benta v. Carroll*, 550 Fed. Appx. 103, 105 (3d Cir. 2014), the Third Circuit held  
 3 that the request for declaratory judgment was “moot,” explaining that when parties are “already  
 4 engaged in litigation,” they are “past the point where a declaratory judgment action can serve a  
 5 prophylactic purpose.” (citing *In re 400 Walnut Assocs., L.P.*, 454 B.R. 60, 75 (Bankr. E.D. Pa.  
 6 2011); *In re Joey’s Steakhouse, LLC*, 474 B.R. 167, 184 (Bankr. E.D. Pa. 2012)).  
 7

8 Here, Plaintiff seeks a declaration that Hartz is liable to Plaintiff for its past conduct.  
 9 Because a declaration of Hartz’s alleged liability would not serve any prophylactic purpose,  
 10 this claim should be dismissed. Furthermore, the parties are already engaged in litigation on a  
 11 number of substantive claims, the adjudication of which will “perforce determine the rights of  
 12 each party.” *Joey’s Steakhouse*, 474 B.R. at 184. Therefore, “the request for declaratory relief  
 13 is, at this juncture, moot.” *Id.*  
 14

15 Moreover, declaratory relief is a mere procedural device. *Aralac, Inc. v. Hat Corp. of*  
 16 *Am.*, 166 F.2d 286, 291 (3d Cir. 1948) (“The [Declaratory Judgment] Act created no new  
 17 rights, but introduced an additional remedy . . . for the determination of an already existing  
 18 right.”). Here, as each of Plaintiff’s substantive claims fails as a matter of law, her cause of  
 19 action for declaratory relief must also be dismissed.  
 20

## 21 **VIII. PLAINTIFF’S CLAIM FOR AN ACCOUNTING CANNOT STAND**

22 Plaintiff argues that she is entitled to an accounting of Hartz’s profits. In a case alleging  
 23 trademark infringement, an accounting of profits is available only “if the defendant is unjustly  
 24 enriched, if the plaintiff has sustained damages, or if an accounting is necessary to deter  
 25 infringement.” *Marshak v. Treadwell*, 595 F.3d 478, 495 (3d Cir. 2009). As set forth above,  
 26 Plaintiff is unable to demonstrate that Hartz has infringed any trademark rights, that Hartz was  
 27

1 unjustly enriched, or that Plaintiff sustained damages as a result of Hartz's actions.

2 Accordingly, Plaintiff's claim for accounting must be dismissed.

3 **IX. THE AGREEMENT PROHIBITS CONSEQUENTIAL DAMAGES**

4 Article 6.5 of the Agreement provides:

5 *IN NO EVENT SHALL EITHER PARTY BE LIABLE TOWARD THE OTHER  
6 PARTY OR ANY THIRD PARTY FOR LOST PROFITS, LOSS OF GOOD WILL,  
7 OR ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR INCIDENTAL  
8 DAMAGES, HOWEVER CAUSED ARISING UNDER ANY THEORY OF  
9 LIABILITY. THIS LIMITATION SHALL APPLY EVEN IF SUCH PARTY HAS  
BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND  
NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY  
LIMITED REMEDY.*

10 (Compl. Ex. A at Art. 6.5 (emphasis in original).) Accordingly, to the extent Plaintiff's claims  
11 seek such remedies, including lost profits and loss of goodwill, such request for relief must be  
12 dismissed as a matter of law.

13 **CONCLUSION**

14 For the foregoing reasons, Plaintiff's Complaint should be dismissed in its entirety.

16 DATED this 15<sup>th</sup> day of October, 2014

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1 *Attorneys for Defendant The Hartz Mountain*  
2 *Corporation*

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## **CERTIFICATE OF SERVICE**

Pursuant to RCW 9.47.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 15th day of October, 2014, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following persons:

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Executed on the 15th day of October, 2014, at Seattle, Washington.

s/Heidi Carchano  
Heidi Carchano, Legal Assistant

DEFENDANT'S MOTION TO DISMISS- 20  
NO. 2:14-CV-1174 RSL

128607.0001/6187918.1

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